VOLUME 1 — NUMBER 1 — AUGUST 1971

# THE ARMY LAWYER

PUBLISHED BY: THE JUDGE ADVOCATE GENERAL'S SCHOOL CHARLOTTESVILLE, VA. 22901

## INTRODUCTION TO THE ARMY LAWYER

This is the first issue of *The Army Lawyer*, a monthly publication of The Judge Advocate General's School. Its purpose is to provide practical, how-to-do-it information to Army lawyers. Thus, *The Army Lawyer* will fill the gap between the *Judge Advocate Legal Service* and the *Military Law Review*, and at the same time consolidate other publications into a single, convenient source. *The Army Lawyer* replaces, in part, the Procurement Legal Service, the Legal Assistance Bulletin, the PP&TO Newsletter, the Claims Administrative Letters, and the noncase materials of JALS, except those items of interest to reservists and those which must have immediate distribution to the field. *The Army Lawyer* will publish comments on recent developments in the law and provide a forum for short articles from the field. It will also carry news of subjects of current general interest to Army lawyers.

*The Army Lawyer* is your publication, and all are encouraged to write and submit articles or comments to the Editor, *The Army Lawyer*, The Judge Advocate General's School Charlottesville, Virginia 22901. Articles should be in manuscript form, typed, double-spaced, with footnotes typed separately, and of a length of approximately five to twenty manuscript pages. "By-line" credit will be given to authors for their articles.

Your comments on how *The Army Lawyer* might be improved are also solicited. Our goal is a publication that meets your needs, and criticisms which will help us to accomplish that goal will be greatly appreciated.

**Distribution of *The Army Lawyer* is one to each active duty Army judge advocate and Department of the Army civilian attorney. If your office is not receiving sufficient copies of *The Army Lawyer* to make this distribution, please write the Editor, *The Army Lawyer* and an adjustment in the distribution to your installation will be made.**

## THE NEW JUDGE ADVOCATE GENERAL

Major General George Shipley Prugh, was born in Norfolk, Virginia, on 1 June 1920. After graduation from Lowell High School, San Francisco, California, in December 1936, he attended San Francisco Junior College from which he obtained the Associate of Arts degree in 1938. He then entered the University of California at Berkeley obtaining a Bachelor of Arts degree in 1941 in Political Science (Public Administration). From 11 January 1939 until 6 August 1940 he had enlisted service in the 250th Coast Artillery (155 mm. gun), California National Guard, being discharged to enter upper division ROTC at the University of California. At Berkeley, he became the Regimental Commander of the Coast Artillery ROTC Regiment and received his commission as a second lieutenant, Coast Artillery Corps, in March 1942 while enrolled in the study of law at Boalt Hall, University of California.

General Prugh's initial assignment was with a 155 mm. gun battery, later serving as S-3, in the 19th Coast Artillery Regiment, Fort Rosecrans, San Diego, California. After attendance at the Battery Commanders' Course, Fort Monroe, Virginia, he joined the 276th Coast Artillery Battalion (155 mm. gun) in 1944 serving as a battery commander in New Guinea and in the Philippines (Leyte and Luzon). He returned to the United States in February 1946, was separated from active duty in May of that year, and entered Hastings College of the Law, University of California, in San Francisco. In November 1947,

The Army Lawyer is published monthly by The Judge Advocate General's School. By-lined articles represent the opinions of the authors and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army. Manuscripts on topics of interest to military lawyers are invited to: Editor, The Army Lawyer, The Judge Advocate General's School, Charlottesville, Virginia 22901. Manuscripts will be returned only upon specific request. No compensation can be paid to authors for articles published. Funds for printing this publication were approved by Headquarters, Department of the Army, 26 May 1971.

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while still a student, he accepted a Regular Army commission. In May 1948 he received the degree of Juris Doctor and reported to Headquarters, Sixth U. S. Army, serving there until his admission to the California Bar and subsequent assignment to the Office of The Judge Advocate General, Department of the Army. He was transferred to JAGC on 13 July 1949 and after a year's duty with the Claims and Litigation Division (OTJAG) he was assigned as Trial Counsel, Wetzlar Military Post in Germany. In 1951 he became the Executive Officer and later Staff Judge Advocate, Rhine Military Post (later Western Area Command) in Kaiserslautern, Germany. On his return to CONUS in June 1953, he served on a Board of Review in OTJAG, Department of the Army, and then in the Opinions Branch, Military Justice Division.

In 1956-57, Major General Prugh attended the Command and General Staff College, Fort Leavenworth, Kansas, and upon graduation reported for duty as Deputy Staff Judge Advocate, Eighth U. S. Army, in Korea. In 1958 he became Deputy Staff Judge Advocate, Sixth U. S. Army, Presidio of San Francisco. After graduating in 1962 from the U. S. Army War College, Carlisle, Pennsylvania, he was assigned as Chief, Career Management Division, OTJAG, DA. He became Executive to The Judge Advocate General in 1963. During that same year he received the degree of Master of Arts from George Washington University.

In November 1964 General Prugh became Staff Judge Advocate, U. S. Military Assistance Command, Vietnam. In August 1966 he assumed the duties of Legal Adviser, U. S. European Command, and on 1 May 1969 became the Judge Advocate, U. S. Army, Europe and Seventh Army. He was promoted to Brigadier General in October 1969. General Prugh took office as The Judge Advocate General of the Army on 1 July 1971, at which time he was promoted to the grade of Major General.

## THE NEW ASSISTANT JUDGE ADVOCATE GENERAL

Major General Harold E. Parker was born in Canton, New York, on 25 March 1918. He attended Cornell University from which he obtained the Bachelor of Arts Degree in Economics in 1938. He accepted a commission as a second lieutenant in the Field Artillery Reserve in 1938.

General Parker came on active duty in the Field Artillery in September 1941 and held various field command positions with artillery units overseas during the period 1941-1944. Following the War, General Parker acted as an instructor at the Military Intelligence School (1946) and served on the War Department General Staff (1946-48).

General Parker then entered Stanford Law School and obtained his LL.B. in 1951. He was admitted to the bar in California the same year. General Parker then served as Assistant Staff Judge Advocate, 7th Army Headquarters; Assistant Staff Judge Advocate, Second Armored Division; and Staff Judge Advocate, First Infantry Division. He attended the Command and General Staff College in 1956, and served as Chief of the Opinions Branch of the Military Justice Division, OTJAG, from 1956-60. He was an instructor at Command and General Staff College from 1960-63, and attended the U. S. Army War College in 1964. He subsequently served as Staff Judge Advocate, Office of the United States Commander, U. S. Army Berlin. He was promoted to Brigadier General in 1968 and served as Assistant Judge Advocate General for Military Law. General Parker took office as The Assistant Judge Advocate General of the Army on 1 July 1971, at which time he was promoted to the grade of Major General.

## ABA YOUNG LAWYER'S SECTION REPORT COMMENTS ON JUDGE ADVOCATES

In his report to the Young Lawyers Section of the American Bar Association, Joseph W. Mullen, Jr., Chairman, commented favorably on the performance of the Judge Advocate General's Corps, and recommended more active efforts to include military lawyers in the activities of the Young Lawyers Section.

He was particularly impressed with the prison visitation program he observed in Germany and the effectiveness with which judge advocates advised accused of their rights.

Mr. Mullen concluded that "we have been missing the boat in not including the military young lawyer in the organized bar." He suggested that the YLS might play a role in assisting military lawyers to establish a greater "professional identity both within, and outside the military," by placing more military lawyers on YLS committees. Finally, he suggested YLS assistance in helping the Corps meet its personnel problems by encouraging the reserve judge advocate program.

## PILOT LEGAL ASSISTANCE PROGRAM

With the approval and support of the American Bar Association, the Secretary of Defense on 26 October 1970 directed the military services to establish Pilot Legal Assistance Programs in cooperating states. This program supplements existing services provided by the civilian bar, such as those of lawyer referral, legal aid and public defender organizations. There is no intent to deprive civilian attorneys of the fees they are now earning from servicemen clients. The Pilot Programs support only those soldiers and their dependents who cannot afford legal fees without undue hardship to themselves and families and who therefore would probably not seek from civilian sources the needed services. This standard results in practically all members in the grade of E4 and below and their dependents being eligible for the program.

The Army was the first military department to obtain authorization from one of the states, New Jersey, for a fully operational test. In the latter part of 1970, officials of the

Monmouth County Bar and Burlington County Bar Associations, and the Board of Trustees of the New Jersey State Bar Association formally indicated their support. On 4 January 1971 the Army was advised that the Supreme Court of the State of New Jersey had given their approval for the initiation of the project.

There followed a series of meetings with representatives of various groups associated with the practice of law in New Jersey. As a result of these organizational efforts, the test began on schedule at Fort Monmouth and Fort Dix.

The experience in New Jersey, from 1 February through 30 June 1971 indicates that of the approximately one thousand potential clients interviewed at each installation per month, only 3 per cent of these individuals have legal problems which qualify for inclusion in the Pilot Program. The cases fall into four general categories—small claims, landlord and tenant, domestic relations and criminal offenses. No matters have been handled in which the client could afford the services of a civilian attorney. Many of the disputes have been settled out of court through negotiations between the adverse parties. Most of the comparatively few cases reaching litigation have been resolved in favor of the servicemen clients. In criminal cases, initially only the non-indictable types of criminal offenders were represented by militiary attorneys. Recently, however, the public defender of New Jersey requested that military attorneys also represent indigent servicemen accused of felonies. The pilot program is acting upon this latter request on a case by case basis.

The New Jersey Bar has collectively and individually supported and encouraged the program. It has provided out-of-state attorneys with workshops and materials which have greatly helped these lawyers in trying cases before the New Jersey courts. Further, the President of the New Jersey State Bar Association, Mr. Joseph T. Grause, on 21 May 1971, wrote to the Secretary of Defense outlining his initial appraisal of this program. He stated, "The program appears to be a worthwhile and successful program. We are not aware of any complaints from members of our State Bar Association or our local Bar Associations that the program has exceeded its scope or purpose and invaded the field of private practice of law. It is our observation that the staff attorneys closely supervise the qualifications of clients requesting representation under this program. We are happy that the State of New Jersey and the New Jersey State Bar Association have been instrumental in the institution of this pilot project and are happy to lend our assistance to the expansion of this program within and without the state."

Similarly, as the result of a meeting of the American Bar Association Standing Committee on Legal Assistance for Servicemen, held at Fort Monmouth, New Jersey on 3 and 4 May 1971, Mr. Louis M. Brown, the Standing Committee Chairman, on 9 June 1971, wrote to Mr. Wright, President of the American Bar Association and stated that his committee enthusiastically commends the program.

The pilot program has also received invaluable support from the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, the Lawyer Referral Service Committee, and from the National Legal Aid and Defender Association.

The Navy, Air Force, Marine Corps and Coast Guard have also been active in establishing pilot programs. The two states which through the efforts of the Chief Counsel of the United States Coast Guard, have provided the most liberal rules of permission for our armed forces attorneys to practice in their courts are Massachusetts and Rhode Island.

The Department of Defense is pleased with the initial results of the New Jersey program. Impoverished military clients now have access to first class legal service, thereby enhancing morale. The Army's reputation for taking care of its own is improved, the civilian bar is supported in the dispensing of justice,

and the goals of the legal profession are advanced.

### Pilot Legal Assistance Program
### New Jersey Statistics

1 Feb 71—31 May 71

| | *FORT MONMOUTH* | | *FORT DIX* | |
|---|---|---|---|---|
| I. LEGAL ASSISTANCE CLIENTS | | 5274 | | 3854 |
| NON-PROGRAM CASES | | 5073 | | 3615 |
| **PROGRAM CASES | | 201 | | 239 |
| II. CASES REJECTED | | 56 | | 152 |
| 1) Financial ineligibility | 36 | | 123 | |
| 2) Fee generating | 9 | | 21 | |
| 3) Non meritorious cause of action | 11 | | 8 | |
| III. CASES ACCEPTED | | 145 | | 87 |
| Small Claims | 9 | | 2 | |
| Landlord-tenant | 24 | | 3 | |
| Domestic Relations | 39 | | 38 | |
| Criminal | 35 | | 20 | |
| 1) Traffic | 9 | | 4 | |
| 2) Misdemeanor | 14 | | 16 | |
| 3) Felonies | 12 | | 0 | |
| Miscellaneous | 38 | | 24 | |
| IV. CASES CLOSED | | 77 | | 54 |
| Negotiation | 21 | | 17 | |
| Litigation | 18 | | 16 | |
| Withdrawal by client | 28 | | 9 | |
| Referral | 10 | | 12 | |
| V. CASES PENDING | | 68 | | 33 |
| VI. ACCEPTABLE CASES COGNIZABLE IN A NON-PROGRAM STATE | | 63 | | 195 |

** A program case is a cause of action cognizable in the courts of a Pilot Program state.

### Pilot Program
### Current Status In Other States

A. The following states have either granted permission or are in the process of granting permission for pilot program attorneys to practice in their courts. These states are listed under the respective services which have been responsible for obtaining this authority.

| *ARMY* | *NAVY* | *AIR FORCE* |
|---|---|---|
| New Jersey | Hawaii | Illinois |
| | California | Louisiana |
| | Florida | Missouri |
| | | Minnesota |

*COAST GUARD*

Massachusetts
New York
New Hampshire
Rhode Island

B. Negotiations are being actively pursued in the following states:

Alaska—Army and Air Force
Colorado—Army
Connecticut—Navy
Kansas—Army
Maine—Coast Guard
Iowa—Military Law Committee
North Carolina—Marine Corps
Pennsylvania—Navy
Texas—Navy and Air Force
Virginia—Navy

## NOTES FROM THE JUDICIARY

*(The following items were prepared by the U. S. Army Judiciary)*

Through the Army Lawyer the U. S. Army Judiciary shall regularly present varied statistics on courts-martial which we think are both relevant and interesting to Judge Advocates in the field. Hopefully these statistics will be meaningful in your every day practice. The U. S. Army Judiciary also plans to pro-

vide guidance relating to recurring errors and irregularities which are found in records of trial forwarded to the Judiciary for review. Though this type of guidance has been provided in the past on an *ad hoc* basis, this method was not satisfactory for many reasons. The Army Lawyer provides an excellent opportunity for wide distribution of this information. Therefore reports on recurring errors and irregularities shall be an integral part of the Judiciary's contribution to the Army Lawyer.

## Statistics

The following is a comparison of general court-martial cases tried before the effective date of the Military Justice Act of 1968 and those tried after the effective date. The data is based upon a survey of all GCM records of trial received in the U. S. Army Judiciary during the periods indicated. The 1970 figures do not include any cases that were tried prior to 1 August 1969.

### ARMY WIDE

| | *Jan-Jun 1969* | *Jan-Jun 1970* | | *Jul-Dec 1970* | |
|---|---|---|---|---|---|
| | *Court w/Mbrs* | *Court w/Mbrs* | *Mil Judge Alone* | *Court w/Mbrs* | *Mil Judge Alone* |
| Number of Persons Tried | 1272 | 178 | 1085 | 193 | 1271 |
| Number Convicted | 1181 (93%) | 148 (83%) | 1038 (96%) | 151 (78%) | 1219 (96%) |
| Punitive Discharges Adjudged* | 942 (80%) | 97 (65%) | 958 (92%) | 95 (63%) | 1114 (91%) |
| Forfeitures Adjudged* | 1126 (95%) | 126 (85%) | 951 (92%) | 130 (86%) | 1050 (86%) |
| Confinement Adjudged* | 1115 (94%) | 119 (74%) | 990 (95%) | 122 (81%) | 1158 (95%) |

A further comparison of the amount of confinement adjudged in the above cases discloses the following:

| | | | | | |
|---|---|---|---|---|---|
| 1 -12 Months | 619 (56%)** | 62 (52%) | 677 (68%) | 68 (56%) | 821 (71%) |
| 13-24 Months | 206 (18%) | 19 (16%) | 187 (19%) | 15 (12%) | 228 (20%) |
| 25-60 Months | 214 (19%) | 29 (24%) | 111 (11%) | 27 (22%) | 86 ( 7%) |
| 61-120 Months | 41 ( 4%) | 3 ( 3%) | 9 ( 1%) | 3 ( 2%) | 15 ( 1%) |
| 120+ Months | 28 ( 3%) | 2 ( 2%) | 6 (½%) | 7 ( 6%) | 6 (½%) |
| Life | 7 (½%) | 4 ( 3%) | 0 | 2 ( 2%) | 2 (.1%) |
| Death | 0 | 0 | 0 | 0 | 0 |

* Percentages based on number convicted rather than number tried.
** Percentages based upon number of cases in which confinement adjudged rather than number tried or number convicted.

### Recurring Errors and Irregularities

(a) Article 61, Uniform Code of Military Justice, provides that the convening authority must refer the record of each general court-martial to his staff judge advocate who must submit his written opinion thereon to the convening authority. There is no authority for dispensing with the staff judge advocate review in a general court-martial case even though the sentence is one that could have been adjudged by an inferior court-martial or the case results in an acquittal or an action that is tantamount to an acquittal. However, whenever a case does result in either an acquittal or an action tantamount to an acquittal the review may be limited to a statement that the court-martial had jurisdiction over the accused and the offenses charged (*See* Paragraph 85*b*, MCM, 1969 (Rev.)).

(b) Many errors in records of trial result from the action of the convening authority relating to the application of forfeitures. One of the most common is where a sentence which includes forfeitures in addition to confinement unsuspended or undeferred has been ordered executed and a provision applying forfeitures as of the date of the action of the convening authority is also included. The provision for the application of forfeitures is surplusage and also mutually inconsistent since under Article 57(a) and (c), Uniform Code of Military Justice, the forfeitures will be effective from the date the sentence is ordered executed. It should also be noted that the approved forfeitures may not be applied during any period in which the service of a sentence to confinement is deferred. Thus the application of forfeitures should also be deferred until the sentence is ordered into execution unless the deferment of confinement is sooner rescinded.

(c) In four recent general court-martial cases, summarized, rather than verbatim, records of trial were erroneously prepared and forwarded for examination under Article 69, Uniform Code of Military Justice. Paragraph 82*b*(1), Manual for Courts-Martial, 1969 (Rev.) provides that a summarized record may be prepared only if the court has adjudged a sentence not including a discharge, and not in excess of that which could otherwise be adjudged by a special court-martial. The sentences adjudged by the *court* in each of these cases exceeded that which could be adjudged in a special court-martial. For example in one case the sentence adjudged by the court included a bad-conduct discharge. Failure to provide a verbatim transcript of the trial results in undue delay for both the accused and the government.

(d) Many records of trial do not contain a proper request for appellate counsel. Often the request has not been executed by the accused. Thus there is no indication that the accused was properly advised of his right to counsel during appellate review of his case. Even though the accused has been properly advised, often there is no written indication that he wishes to have military counsel appointed to represent him. The accused should also state his intention regarding the procurement of civilian counsel to represent him at the appellate level. Proper execution of these requests would speed up the appellate process. *See* Article 70, Uniform Code of Military Justice.

### Clerk of Court

Effective 21 June 1971, Colonel Abraham Nemrow, JAGC, (Ret.) assumed the duties as Clerk of the Army Court of Military Review. All inquiries relating to records of trial or to the status of cases before the Court of Military Review should now be directed to the Clerk of Court, Army Court of Military Review. (Phone: 201-756-1701, Autovon 289-1701)

## SUGGESTIONS FOR A SUCCESSFUL RECOVERY PROGRAM

*(The following Article was prepared by the U. S. Army Claims Service)*

Recovery action against third parties for loss, damage, or destruction of personal property of military personnel and civilian em-

ployees while in transit or storage is a most interesting and challenging function. It affords an opportunity to match your legal knowledge against that of the hundreds of claims personnel representing the carriers, warehousemen, insurance companies, and other third parties. Equally important is the fact that all money recovered is credited to the claims appropriation and is available for payment of other claims. To be successful you must acquire a thorough knowledge of the basic principles involved in this field. Primarily you must be familiar with and thoroughly understand the principles set forth in Chapter 11, AR 27-20. The following suggestions are submitted to assist in the operation of a successful recovery program. A copy of this and all successive articles on recovery should be maintained in a separate file by recovery personnel.

1. Demand on carrier/contractor. This demand must show that the item is missing or the specific damage claimed. The make, model, and serial number should be shown for appliances.

2. All copies of the Demand on Carrier/Contractor must be signed, fully completed, and date of dispatch entered. Demands should be dispatched promptly with original copy going to home office of carrier to whom the Government bill of lading was issued.

3. Inventory numbers must be shown. Packed items should show the carton inventory number.

4. When a third party makes repairs to claimant's property and the claimant is not satisfied with the repair job, the third party must be promptly notified and afforded an opportunity to make proper repairs.

5. Claims office personnel must advise all claimants that third parties have a legal right to inspect the damaged property and to prepare an estimate of repairs.

6. No one, including the Government, can force an owner to have his property repaired by any particular repairman or even to have the property repaired.

7. Repair estimates should show the actual damage repaired—not just "refinished" or "repaired".

8. When the claimant has made no written exceptions at delivery, has not notified the proper parties of his loss or damage within 30 days from date of delivery, and the carrier denies liability on these grounds, consideration will be given to applying the provisions of paragraph 11-36, AR 27-20. Particular attention, however, is invited to subparagraph 11-36*c*, which sets forth certain requirements which must be met before an award to claimant is reduced on these grounds.

9. When a claimant has insurance coverage on a shipment he must file a claim against the insurance company. Claims officers should assist in filing such claims and follow up as recovery action.

10. The statement of facts and circumstances as shown on page 1 of the Claim Against the Government should be as detailed as possible. Too many merely state that loss and damage were noted at delivery, when, in fact, no delivery document contains such an entry. Unusual circumstances should be set forth. The specific document on which written exceptions were recorded will be shown. If written exceptions were not recorded, an explanation of why not will be set forth. The use of printed forms for this section is discouraged for they do not give a complete picture of the shipment.

11. Claims personnel should make it very clear to all claimants that when the Government pays their claim the Government is entitled to all third party payments on that claim to the extent of the Government payment.

12. When a claimant has received an overpayment by virtue of having received payments from the Government as well as a third party and fails to respond to written demand for reimbursement, recovery action should be

vigorously pursued through command or finance channels.

13. When a file contains unanswered factual questions or a third party raises a question, do not hesitate to go back to the claimant or other party to get clarifying statements. The sooner such statements are obtained the better.

14. The MTMTS list of authorized carriers has been distributed. This list contains the home office address of authorized carriers and demands should be forwarded to that address with copy to local agent.

15. Military Airlift Command (MAC) operates Government owned aircraft and also charters commercial aircraft. Recovery action must be pursued when a chartered commercial aircraft is involved in the loss or damage.

16. Under the provisions of the Government bill of lading, the carrier is entitled to prompt notice of loss or damage and the opportunity to inspect if he desires. Exceptions at delivery, of course, is prompt notice. Failure to except at delivery does not bar a claim since the Government bill of lading provides that later discovered loss or damage will be reported promptly to the carrier and he will be afforded an opportunity to inspect. Any notice to the carrier within thirty (30) days from date of delivery is considered prompt notice. Written exceptions at delivery, preferably on DD Form 619, is the desired method of notice. For later discovered loss or damage the letter "Notice of Loss or Damage", paragraph 11-29*b*, AR 27-20, is the most vital document. Please work closely with your transportation officer to insure that he dispatches this letter within 24 hours from the time he receives notice of the loss or damage. Transportation officers should be referred to Department of the Army Circular No. 55-59, 30 March 1971, Transportation Movements Guide, Section XIV, regarding this letter. A signed and dated copy of each letter must be forwarded with other transportation papers to the claims office processing the shipper's claim.

17. Government Inspection Reports must show the date of inspection, details of the damage sustained, and be signed by the inspector. When damage is due to improper packing, specific details demonstrating improper packing must be shown.

18. Claims offices must maintain close liaison with their transportation offices to solve mutual problems.

19. The provisions of the Government bill of lading specifically eliminate the commercial time limitations for notice, filing claim, and filing suit. The statute of limitations for filing written claim on a carrier is six years (not nine months). However, the carrier must be notified of the loss or damage within 30 days of delivery. An exception to this 30 days notice rule can be made when carrier personnel deliberately misinform the shipper that he has 30, 60 or 90 days in which to make a claim. In such cases where the notice is given within the time specified by carrier personnel, recovery action will be pursued. Such violations should be reported to the origin transportation officer for corrective action with the carrier.

20. Carrier Response to Claims Correspondence. Attention is invited to Army Regulation 55-356 which contains a sample copy of the tender of service submitted by carriers. It requires a carrier to acknowledge receipt of a claim within ten days after its receipt, and to pay, or make a firm offer in writing within 120 days after receipt of the claim. If the claim is not processed and disposed of within 120 days after receipt thereof, the carrier will at that time and at the expiration of each succeeding 30 day period while the claim remains open, advise in writing of the status of the claim and the reasons for the delay in making final settlement thereof. Failure to comply with the above provisions constitutes a violation of the tender of service for which the carrier may be suspended or disqualified. When a field claims office encounters unnecessary delay in responding or failure to respond, the above provisions should be pointed out to the carrier. If this does not produce a

reply, then a letter will be forwarded to the original transportation officer setting forth complete details and requesting suspension action for the violation.

21. Many claim files are being forwarded to the U. S. Army Claims Service without giving third parties adequate time in which to reply. This results in a mass of later forwarded correspondence which is difficult to match with the appropriate claim file. A suspense of at least 60 days is considered appropriate.

22. Do not use threatening or abusive language in corresponding with third parties.

23. Claims offices should furnish third parties a copy of requested documents.

24. Compromise is a useful tool in appropriate cases in settling recovery claims against third parties. So many variables are involved, such as weights, pre-existing damages, reasonableness of repair estimates, etc., that it is often difficult to establish an exact amount due.

25. There is no objection to executing a release and returning it to the carrier who will then forward a check.

26. The Government's practice of shipping through multiple third parties (more than one contract involved) in many cases makes it almost impossible to fix liability on any one party. Don't waste too much time on recovery action in such cases.

27. The carrier named on the Government bill of lading is responsible for the shipment from origin to destination regardless of the fact that other carriers may have handled the shipment as its agent.

28. The Claims Analysis (Comparison) Chart is a most useful recovery document. It presents a complete, factual, concise picture and can be the basis for mutual discussion of liability with third parties. Be sure you prepare it completely and accurately.

29. When a claim for lost property has been paid and thereafter the carrier or warehouseman notifies that the property has been located, the carrier or warehouseman should be immediately notified to hold the property pending disposition instructions. The procedure set forth in paragraph 11-37, AR 27-20, should then be followed.

30. A release obtained from the claimant by a third party based on fraud, duress, or misrepresentation is not binding and further recovery action should be pursued in appropriate cases.

31. Repairs must be made by a competent repairman in the area in which the property is located. When such an estimate is obtained and it is reasonable for the area, do not accept carrier's assertion that the average cost of such repairs is less. It certainly costs more to repair an item in New York City than it does in other areas. Let the carrier submit a competitive written estimate from a competent repairman in the area. When he does this a compromise may be in order.

32. When a carrier has accepted a shipment of household goods from a warehouseman in apparent good order and receipted for them without exception, such carrier has the burden of establishing by all the facts and circumstances that he is not responsible for the damage discovered on delivery at destination. A mere allegation of improper packing is not sufficient. Evidence submitted by the carrier should be adequate for the contracting officer to hold the warehouseman liable. The carrier is required by the tender of service to unpack at delivery (unless waived in writing by the shipper) and to record loss and damage at delivery and to give the shipper a copy. The carrier thus has the opportunity to record improper packing conditions with witnesses. If unpacking is waived in writing, then the carrier has been deprived of his right to obtain evidence and the claim should not be pursued on such items unless the carrier has been afforded the opportunity to inspect within thirty days from date of delivery.

33. On Code 5 shipments the carrier to whom the through GBL is issued packs the goods and transports them to the port. The Government (MSC—formerly MSTS) then takes over the shipment for the ocean portion of the trip. The carrier then picks up the shipment at the CONUS port and delivers to the destination. Carriers are denying liability on the assertion that the damage occurred while the goods were in the custody of the Government (MSC). A carrier is not liable for loss or damage to household goods which occurs when the goods are in the custody of the Government. However, the burden is on the carrier to prove by competent evidence that the loss or damage did in fact occur while the goods were in the custody of the Government. In most cases the carrier picks up the shipment at the CONUS port without exception and therefore cannot produce evidence that the loss or damage occurred while the goods were in the custody of the Government.

34. Under the tender of service a carrier is not liable for damage to packed items caused by improper packing when the packing was not performed by the carrier. The burden of proof to show that the damage was caused by improper packing is on the carrier. Seldom can such evidence be produced and the carrier should be held liable when it cannot produce the evidence. A mere allegation of improper packing is not sufficient.

35. Few claim files contain a copy of an airway bill. Some show the airway bill number on the Government bill of lading. The number of the airway bill and a copy, if available, should be furnished the airlines upon request. However, a denial of liability or refusal to act on a claim unless a copy of the airway bill is furnished will not be accepted. The Government bill of lading is the contract of shipment and it is up to the airline to obtain a copy of the airway bill.

36. Claims for loss or damage to privately owned vehicles by ocean carriers are to be processed pursuant to paragraph 11-38*a*, AR 27-20. Do not forward files of such claims to the U. S. Army Claims Service.

37. Recoveries from third parties must be reflected in the claim file forwarded to the U. S. Army Claims Service, either by deduction from amount otherwise allowable or by copy of cash collection voucher reflecting deposit. Recovery must also be shown on DA Form 3 accompanying file. Deposits must be to accounting classification 01-3501.

38. Files are being received on which recovery amounts are not reflected on DA Form 3. When this occurs such recoveries are not entered in the computer and will not be reported.

39. Checks drawn on foreign banks received from third parties should be forwarded to the Army claims office located in that country with request for deposit and return of cash collection voucher reflecting deposit. Details for completing cash collection voucher must be furnished.

40. Claim files are being forwarded as "Impasses" on which little or no recovery action has been taken. Every effort to recover must be taken before forwarding as "Impasses".

41. When files forwarded to the U. S. Army Claims Service as "Impasses" contain checks, the checks should be placed on top of the file under the DA Form 3.

42. Claim files forwarded to the U. S. Army Claims Service for further recovery action must contain a legible copy of all required documents.

43. Claim files forwarded to the U. S. Army Claims Service for further recovery action must contain copy of Claims Analysis (Comparison) Chart. This chart must be complete, accurate, and legible since a photostatic copy will be forwarded to third party in recovery action.

44. Many files are being forwarded as impasses which contain unanswered correspondence from third parties making a detailed

offer and, in many cases, forwarding a check. Such correspondence must be answered setting forth the reasons for your disagreement with the offer prior to forwarding the file.

45. When a claim file is returned to a field claims office for any reason it is given a suspense date by the U. S. Army Claims Service. If the file has not been returned at the expiration of the suspense, a letter of inquiry as to status is dispatched to the field office. Prompt reply to this letter of inquiry is expected, a longhand reply on the letter of inquiry is acceptable.

46. Items stolen from interstate shipments which have serial numbers or are otherwise readily identifiable should be reported to the FBI.

The Recovery Division, U. S. Army Claims Service is available to answer questions and to assist in any way in improving the recovery program (Autovon 923-5214 or Commercial 677-5214).

## LITIGATION DIVISION ITEMS

*(The following items were prepared by the Litigation Division, OTJAG.)*

### Medical Care Recovery Act

1. *New Rates: $61 and $13*

The Director, Office of Budget and Management has announced that the rates of recovery under the Federal Medical Care Recovery Act for care rendered on and after 1 July 1971 are $61 per day of inpatient treatment and $13 per visit for outpatient care. 36 F.R. 11327 (11 June 1971)

2. *Procedural Defense Does Not Defeat U. S. Claim*

A procedural device—even one which prevents any other plaintiff from recovering for medical expenses—does not interfere with the Government's rights under the FMCRA. *U. S.* v. *Haynes & Allstate Ins. Co.*, No. 30650, (5th Cir. 1 June 1971). Under Louisiana law, in a personal injury case the medical expenses of a married woman are considered expenses of the conjugal community. Only the husband may sue for expenses of the community. Thus, in a case in which a wife is injured through the fault of her husband, no recovery may be had by either spouse for her medical expenses. In the present case the court held that these arrangements are procedural in nature and not a bar to U. S. recovery. The *Haynes* decision is in line with *U. S.* v. *Fort Benning Rifle & Pistol Club*, 387 F.2d 884 (5th Cir. 1967) (Statute of Limitations); *U. S.* v. *Gera*, 409 F.2d 117 (3d Cir. 1969) (Statute of Limitations); and *U. S.* v. *Housing Authority of the City of Bremerton*, 415 F.2d 239 (9th Cir. 1969) (Contributory Negligence of parents of injured party). The Court emphasized that there is but a "single limitation contained within the Act, namely that the defendant must have committed a tortious act . . . ." Therefore, "those defenses which have nothing to do with whether the circumstances surrounding the injury create a tort, cannot defeat the independent right of the United States to recover." The Court found that the attribution of the medical expenses to the community and from it to the husband who could not sue himself "relates to whether the injured person can recover for the tort, not whether an actionable tort in fact was committed." This procedure does not prevent the Government from recovering.

Thus, a refined analysis of the nature of the defense asserted to defeat the Government's right must be made. Defenses deemed procedural will not defeat the Government's claim. The only non-procedural defense mentioned in the above-cited cases is contributory negligence by the injured party. It is possible that if under the normal definition of negligence or other tort rule a defendant would be liable to the injured party, the Government may collect its medical bill even though a state law rule would prevent the injured party or other plaintiff from recovering on the same facts. This is especially true with doctrines such as interspousal and intrafamily immunity which are based on policy

considerations inapplicable to the Government. See dicta to that effect in the penultimate paragraph of the decision.

3. *Annotation*

The case of *U. S.* v. *Merrigan,* 389 F.2d 21 (3d Cir. 1968) is annotated at 7 ALR Fed. 279. Section 15 dealing with intrafamily immunity would appear to be out of date in view of the *Haynes* decision.

4. *Regulation: Quarterly Affirmative Claims Report*

No backup papers—vouchers, demand letters, etc—to the Affirmative Claims Report (DA Form 2938-R, 1 Jun 69) are required by paragraph 14-4, AR 27-20.

Tort Branch, Litigation Division, OTJAG, continues to receive obsolete DA Forms 2938-R which do not provide the required information. Reports should be submitted on DA Forms 2938-R, dated 1 Jun 69, as shown in Figure 14-1, AR 27-20.

**Non-Appropriated Funds — Immunity from Suit**

In an appeal from the United States District Court for the Western District of Texas the Court of Appeals for the 5th Circuit reversed a judgment in favor of the Swiff-Train Company against the United States involving a contract with a non-appropriated fund activity of the United States. Swiff-Train Company was the supplier of carpeting to Midwest Carpet Distributors who had entered into a contract with the Fort Sam Houston Guest House Fund to carpet the rooms, hallways and stairs of the buildings which comprised the guest house. The contract called for payment to be made in the form of a check made payable jointly to Midwest Carpet Distributors and Swiff-Train Company in order to insure payment by Midwest to its supplier. Despite this provision in the contract the check from the Guest House Fund was made payable only to Midwest Carpet Distributors who after cashing it failed to make payment to Swiff-Train. After an unsuccessful attempt to recover monies due it from Midwest, Swiff-Train Company brought an action to obtain recovery against the United States.

The district court in ruling in favor of the carpet supplier equated the waiver of sovereign immunity for non-appropriated fund activities by the United States in the Tort Claims Act, 28 U.S.C. § 1346(b) with the waiver of such immunity in the Tucker Act, 28 U.S.C. § 1346(a)(2) even though such a ruling was contrary to the great weight of case law in this area.

The Court of Appeals in reversing the judgment of the district court reviewed the immunity of a non-appropriated fund arising from dictum of the United States Supreme Court in the case of *Standard Oil Company of California* v. *Johnson,* 316 U.S. 481 (1942). The court noted that although the Standard Oil case did not hold that a non-appropriated fund was immune from breach of contract actions because of sovereign immunity it did point in that direction.

The Court of Appeals held that any doubt as to the intention of Congress on the question of immunity from suit of the various types of non-appropriated funds was resolved by the action of the 91st Congress in passing Public Law 91-350, 84 Stat. 449 which was signed into law on 23 July 1970. (Subsequent to the lower court decision in this case.) This law expressly amended the Tucker Act, 28 U.S.C. § 1346(a)(2) so as to bind the United States on contracts made with all service post exchanges. The legislative history of this amending action before both houses of Congress makes it clear that other forms of non-appropriated fund activities aside from post exchanges were not subject to this withdrawal of sovereign immunity. Although the Senate version originally provided for withdrawal of sovereign immunity from *all* non-appropriated fund activities this was contrary to the measure reported out of the House committee which ultimately became the version that was enacted into law. The reasoning behind the House version was laid primarily to the fact

that while post exchanges usually have sufficient funds to reimburse the United States for judgments against them this is not the situation with all non-appropriated fund activities. This would result in some judgments against non-appropriated fund activities being paid from tax revenues which is contrary to the concept of the non-appropriated fund activities. Based upon this clearly expressed Congressional intent not to expand the withdrawal of sovereign immunity from other than service post exchanges the Court found the Fort Sam Houston Guest House Fund immune from suit and reversed the decision of the district court in favor of Swiff-Train Company. (*Swiff-Train Company* v. *United States*, CA 5th Circuit (June 11, 1971))

## PROCUREMENT LEGAL SERVICE

*(This section was prepared by the Procurement Law Division of The Judge Advocate General's School.)*

**1. Cost Overrun — Abuse of discretion of the contracting officer found. GENERAL ELECTRIC CO. v. U.S. —— Ct. Cl. —— (Apr. 16, 1971).**

In this case, the contractor was working under a cost-plus-incentive fee contract. The total amount of the contract, including target fee, was $835,000. The contract provided for provisional billing rates for overhead and included the standard Negotiated Overhead Rates clause. The latter clause provides that final overhead rates will be negotiated and shall be set forth in the contract by modification.

The contract also contained a Limitation of Cost Clause (LOCC) which required the contractor to notify the contracting officer whenever ". . . . Contractor has reason to believe that the total cost to the Government, exclusive of fixed fee . . . will be substantially greater or less than the estimated cost thereof . . . ." The contract was completed in May of 1964 but final negotiated overhead rates were not included until May of 1966. These final rates were higher than the provisional rates and resulted in an overrun of approximately $60,000. The contractor requested payment of these additional costs and the contracting officer denied the request stating that no notice had been given pursuant to the LOCC. The ASBCA affirmed the contracting officer's decision in 69-1 BCA 7708 (1969).

The Court of Claims holds that the refusal of the contracting officer to fund this overrun was an abuse of his discretion and that the contractor was entitled to the additional monies. The Court found that the contractor could not have known about the overrun in time to notify the contracting officer, that its accounting procedures were not inadequate, and that there was nothing to indicate dissatisfaction with the contractor's performance. The Court then states, ". . . [W]e hold that a contracting officer abuses his discretion . . . if he refuses to fund a cost overrun where the contractor, through no fault or inadequacy on its part, has no reason to believe, during performance, that a cost overrun will occur and the sole ground for the contracting officer's refusal is the contractor's failure to give proper notice of the overrun."

*COMMENT*: Aside from the obvious importance of this case in interpreting the LOCC, it is but another of a growing number of instances where the Court of Claims is acting to limit the discretion of the contracting officer. Of particular note are two Commissioner's decisions which have not, as of this writing, been adopted by the full court. In *H. N. Bailey v. U. S.*, Ct. Cl. Comm., 15 CCF 83960 (Oct. 1970) and *Astro Science Corp. vs. U. S.*, Ct. Cl. Comm., 15 CCF 84047 (Oct. 1970) different commissioners found the contracting officer to have a duty to independently determine whether a contract should be terminated taking into consideration those factors listed in ASPR 8-602.3. The language in these decisions would indicate that the contracting officer would be abusing his discretion should he fail to consider the policy factors. Such an abuse of discretion could result in the termination being converted to one for convenience. Earlier Board decisions had

indicated that the decision to terminate the contract was one which would not be questioned and was totally discretionary. See *El-Tronics*, 60-2 BCA 2712 (1960).

The holding in *General Electric* has recently been distinguished by the ASBCA in a case where it was shown the contractor could have anticipated overhead rate increases. J. J. Henry Company, Inc., ASBCA Nos. 13835-9 and 13881, May 25, 1971.

**2. Termination — Government right to damages — Burden of proof. ATLANTIC TERMINAL CO., ASBCA 13699, 71-1 BCA 8866 (1971).**

This was a contract for railroad services for a one year period. The contractor was required to haul freight cars containing ammunition and explosives to a loading area. At the loading area a separate stevedoring contractor would load the cargo onto ships. The contract was terminated for default due to the unsatisfactory performance of the contractor and the default was upheld in ASBCA 13269, 69-2 BCA 7852 (1969).

The issue in this appeal was, *inter alia*, the Government's right to collect damages in addition to the excess costs of reprocurement. These damages included charges for delays when the contractor failed to make cargo available to the stevedores. As a result of the delays the Government had to pay the stevedores for detention time. These same delays had been the basis for the termination and the contractor asserted that they were excusable.

The Board acknowledges that it has jurisdiction to decide the merits of the Government's claim for common law damages. It then goes on to discuss the burden of proof in such a case as opposed to the burden of proof to sustain a termination. In the latter case the Contractor must prove the existence of excusable delays but in the former, the Government must prove, not only that the Contractor's performance gave rise to the delay costs, but that the nonperformance was not due to excusable causes.

The Board then found that the Government had not sustained this burden and disallowed the claim for damages.

*COMMENT*: The ASBCA has taken a consistent position that it has jurisdiction to review the merits of a common law claim for damages asserted by the Government. *Hydromatics, Inc.*, ASBCA 14446, 70-2 BCA 8490 (1971). Other boards have been less willing to decide such a claim. *GMC Truck and Coach Division*, DOTCAB 67-16, 68-2 BCA 7114 (1968); *McGraw Edison Co.*, IBCA 699-2-68, 68-2 BCA 7335 (1968).

The subject case highlights some of the difficulties which will be faced by the Government in proving common law damages. In addition to the burden of proof noted in the case, prior cases have held that the Government must also show that the damages were foreseeable and within the contemplation of the parties at the time of contracting. *Hydromatics Inc., supra.* Thus in *Atlantic* the Government would have to have shown that the Contractor was aware or should have been aware of the potential detention costs which resulted from their late delivery.

The decision upholding the default termination in this case is also of interest. In that case the contracting officer had issued a cure notice for numerous deficiencies and then proceeded to terminate the contract prior to the expiration of the 10 day cure period. The Board upheld this termination since it found that no cure notice was required. Two members dissented stating that the T4D was premature prior to the expiration of the cure notice period. *B & C Janitorial Services*, 66-1 BCA 5355 (1966).

**3. Requirements Contracts — Government violates standard of good faith. COMP GEN, Ms G-171484, 4/28/71.**

The contractor had entered into a requirements contract whereby he had agreed to provide all requirements of ½" standard interior plywood [grade CD] for a 6 month period. The estimated quantity was 896,000 sq. feet. The contract required delivery on order of up

to 150,000 sq. feet per month. No orders were ever issued under the contract. Upon inquiry, the procuring activity indicated that it had purchased a different grade [CC] of plywood to satisfy its needs.

The contractor claimed breach of contract damages in the amount of $8,048.88 which is the difference between the contract price and market price for the initial 376,000 sq. feet of plywood purchased by the contractor in order to meet anticipated orders. The Claims Division of GAO determined that the contract was for CD plywood, that no other orders for CD plywood were placed during the contract period and there was, therefore, no legal basis for the claim. The contractor requested reconsideration.

Upon reconsideration, the Comptroller General found legal basis for the claim. Relying upon *Gemsco Inc. v. U. S.*, 115 CC C1 209 (1950), where the Court found a similar situation, the Comp. Gen. states that it was not unreasonable that the contractor would acquire and store substantial quantities of the product to meet possible demands required by the contract. Further, the fact that no notice was given the contractor that the government would not order any plywood under the contract indicates that the government was not acting in good faith. Citing the Court of Claims the Comp. Gen. states, "Ordinarily where the quantity ordered is considerably more or considerably less than that anticipated from a reading of the contract terms, the court will protect the aggrieved party from unfair usage by applying a test of good faith to the other party's actions." *Shader Contractors, Inc., et al. v. U. S.*, 149 Ct Cl 535 (1960).

The Comp. Gen. limits the contractor's recovery in this case to those sums which he could obtain were the contract terminated for convenience.

*COMMENT*: The widespread use of the requirements type contract at the post, camp and station level dictates that procurement legal advisors carefully review estimated quantities to ensure that they are reasonably accurate. The unrestricted use of requirements type contracts has been questioned by the Comptroller General in Comp. Gen. Dec. B 170544 (Jan 1971) (Uupublished). In that decision the Comp. Gen. criticized the procurement of certain generator sets by means of a requirements contract. It was noted that funds were available and the agency's needs had been ascertained with reasonable certainty. While the requirements contract would be authorized by ASPR 3-409.2 (b) the Comptroller feels that a better price could have been obtained through the use of a more definitive type of contract.

## LEGAL ASSISTANCE

*(The following items were prepared by the Legal Assistance Division, OTJAG.)*

1. Administration
   a. Bulletin Incorporated in *Army Lawyer*
   b. Telephone Etiquette
2. Consumer Affairs: Pyramid Sales
3. Paternity Claims: German Guardianship Court Decrees
4. Power of Attorney: POW/MIA Problems
5. Support and Dependency: *Remillard* v. *Carleson*
6. Taxation
   a. Federal Gift & Estate
   b. Pennsylvania Income Tax Declared Unconstitutional
   c. Rhode Island Income Tax Lapses
7. Veterans' Benefits: Cadets and Midshipmen

**1. Administration:**

a. *Bulletin Incorporated in Army Lawyer.*

With the inauguration of the *Army Lawyer*, the Legal Assistance Bulletin will be discontinued. Information formerly published in

the latter will be disseminated to the field by this new publication. Material in the form of pamphlets, books, and leaflets will continue to be shipped on an unscheduled basis directly to Legal Assistance Offices.

b. *Telephone Etiquette.* The telephone is often the first contact that a client has with the Legal Assistance Office. That contact should reflect the competency and professionalism of the entire office. Reprinted below is a brief article on telephone etiquette that sets forth 12 obvious, but often overlooked, guidelines. It is suggested that each person read this material.

for anyone who may be

## ANSWERING THE TELEPHONE

Cullen Smith*

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Telephone etiquette deserves more attention than most law firms or organizations give it. For many callers, the person who answers the prone is their first contact with the firm and, consequently, the person who establishes that lasting "first impression." Although each law office is different, every lawyer wants to be courteous to his clients. These guidelines for telephone etiquette are all based on the idea of serving the person who calls and are meant to provide a reminder for those who present a verbal image of the lawyer and his work.

### The First Impression Is Most Important

1. Answer promptly—if you cannot or may not be able to answer promptly, arrange for someone else to answer—do not leave this important job to chance.

2. The first impression received comes from your voice and attitude, and the way you handle the call will set the tone for the entire conversation. You should be cheerful but businesslike and efficient. Leave the impression that you are calm and collected regardless of the true situation. Most important, the caller should be able to tell that you are thinking about him.

### When the Lawyer Cannot Take the Call, You Are His Representative

3. Know where the lawyers are and, if they are out of the office, know when they will be back. It is their obligation to tell you, BUT it is also your obligation to know. Ask if you see them leaving. In addition, try to keep up with the lawyers within the office, but do not keep someone holding while you hunt everywhere.

4. Never keep the caller waiting on the line wondering if he has been forgotten or you are trying to "think up" something to tell him. If he wants to hold, check back with him regularly or offer to call him when the lawyer is off the other line. Be sure to follow through.

5. Do not panic over long distance telephone calls when you cannot locate the lawyer. It is almost as easy to return such calls as it is local calls. You will normally find out who is calling and from where before you take long distance telephone calls. Use your judgment on such calls—don't disturb a lawyer who is with clients just because he has a long distance call. Try to develop a sixth sense as to whether the lawyer should be disturbed.

6. If possible, give the caller an estimate as to when the call will be returned, but do not be too close. That is, if you think the lawyer will be back in 30 minutes, say one hour; if you think he might be back late in the evening, say tomorrow morning. This way, the caller will be pleased if he is called earlier and not think he is being ignored if the delay is more than you expected. Try to avoid saying "one moment please" and then

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**Mr. Smith, Chairman of the ABA Special Committee on Law Book Publishing Practices and former Chairman of the ABA Standing Committee on Economics of Law Practice, is a partner in the firm of Naman, Howell, Smith & Chase in Waco, Texas.*

telling the caller that the attorney is in conference or out of the office. This sounds like the lawyer just told you to say that to avoid the call.

7. If there is going to be a long delay in returning the call, ask if sime other lawyer can help, or perhaps the secretary, depending upon the caller, the lawyer and the secretary. When you cannot complete a call, always ask for the caller's name and number, adding "so that Mr. X can call you." In other words, ask for the information to help the client. When possible, address the caller by name and repeat it as often as possible—"Mr. Wheeler, I'll have Mr. Howell call you just as soon as he returns from the courthouse."

8. Keep up with calls that you know are not returned. If the lawyer is still in conference or delayed in returning to the office, have his secretary return the call, explaining the delay so that the client will know he has not been forgotten.

9. If you make a mistake or need to explain your actions to the caller, do so politely but do not appear unsure of yourself or of what you are doing. Remember, your purpose should always be to help the caller.

**When the Lawyer Becomes Available, Be Ready To Give Him All the Information He Needs**

10. Be sure to tell the lawyer the details of unusual conversations or problems relating to calls.

11. If you take a message, be sure that you have it correctly. If necessary, repeat the message to the caller.

12. If a lawyer does not give you the information you need, tell him. The lawyer wants to help you, but you may have to persist. Let him know when you did not know where he was; find out where he is going, when he will return, what to tell his callers; ask him what you should have said when you did not know where he was because he did not tell you.

**Some Phrases Convey the Wrong Impression**

"He hasn't come in yet."

"I have lost Mr. X." "I don't know where he is."

"He has said to hold his calls."

"He can't be disturbed."

"He has left for the day."

"He is playing golf."

"He is on a trip."

"He is not in this afternoon."

"He left early."

"Hasn't he returned your call, yet? I gave him the message last week."

**A Better Response Is One That Is Helpful and Informative**

"He has a client with him. If you wish, I can call him out of the office to speak with you, or he can call you as soon as his client leaves."

"He is in the trial of a case." (Tell when he may be called or when he can return the call.)

"He is taking depositions."

"He is out of town on a case."

"He is at a hearing at the courthouse."

"He is out of the office but we expect him back by —."

"He is out of the office and we don't know whether he will be able to get back before the office closes."

**2. Consumer Affairs: Pyramid Sales**

Recently, many servicemen made comparatively large investments in pyramid sales organizations. This type of business endeavor emphasizes solicitation of distributors who are required to make a substantial initial investment. The firm engages in little or no con-

sumer-directed advertising. Subsequently, a distributor is effectively abandoned by the company after having purchased substantial amounts of an unadvertised product. The Federal Trade Commission has initiated action against several of these corporations in an attempt to eradicate misrepresentative and inherently unfair business practices. In addition to the possible violation of Federal Trade Regulations, pyramiding and similar activities are prohibited by various state laws. The active duty serviceman should be advised of the above caveats as well as the proscriptions of paragraph 12, Army Regulation 600-50, 29 June 1966, as changed relating to the selling of any commodity.

### 3. Paternity Claims: German Guardianship Court Decrees

Under German law, the father of any illegitimate child may be required to support that child through filiation or bastardy proceedings. The person who is alleged to be the father is summoned to appear before the Guardianship Court (Vormundschaftsgericht) where he is asked whether he is prepared to acknowledge paternity. If he acknowledges paternity, a judicial decree of acknowledgment and support is rendered. By an exchange of notes on 3 August 1959, the United States and Germany reached an understanding with respect to paternity and maintenance claims against United States service personnel. Notwithstanding the fact that the United States military services do not possess the powers of civil courts to enforce or execute judicial orders or contractual undertakings for child support, it was agreed that the military services would cooperate with the German courts and authorities. Paragraph 2 of Army Regulation 608-99, Paternity Claims, sets forth the procedures for processing a claim based on a foreign court order or decree. The Judge Advocate General of the Army has expressed the opinion that a decree of acknowledgment and support by a German Guardianship Court based on a serviceman's admission of paternity is a "judicial order or decree of paternity . . . duly rendered by a . . . foreign court" under the provisions of AR 608-99. It is a function of command to secure compliance with a decree; non-compliance with or violation of the decree may result in disciplinary or administrative action.

### 4. Power of Attorney: POW/MIA Problems

Most states do not have legislation dealing with the problem of the effect that a POW/MIA status of a serviceman has upon a power of attorney previously executed by him. One state, Florida, has specifically provided by statute that a report by a branch of the Armed Forces officially listing the principal in a missing status, as defined in 37 USC § 551 or 5 USC § 5561, does not terminate the validity of a power of attorney (Florida Statutes § 709.05). However, it apparently does not reach the issue presented when the serviceman remains in the POW/MIA status beyond the termination date specified in the power of attorney. In this latter event, the power would seem to terminate, leaving the attorney-in-fact with no authority to act for the principal. In the absence of comprehensive legislation on this subject, specific treatment should be incorporated into the power of attorney to obviate the potential hardships that could be caused by an expired document. The following language is suggested:

> I further declare that any act or thing lawfully done hereunder by my said attorney shall be binding on myself and my heirs, legal and personal representatives and assigns, whether the same shall have been done either before or after my death, or other revocation of this instrument, unless and until reliable intelligence or notice thereof shall have been received by my said attorney; and whether or not I, the grantor of this instrument, shall have been reported or listed, either officially or otherwise, as "missing in action" as that phrase is used in military parlance, or as "captured", it being the intent hereof that such status designation shall not bar my attorney from fully and completely exercising and continuing to exercise any and all powers and rights herein granted, and that such report of "missing in action" or "captured" shall neither constitute nor be in-

terpreted as constituting notice of my death nor operate to revoke this instrument.

Notwithstanding my insertion of a specific expiration date herein, if on the above specific expiration date, or if at any time within thirty (30) days immediately preceding that specified expiration date, I should be, or have been, carried in a military status of "missing-in-action" or "prisoner-of-war", then this power of attorney shall automatically continue to remain valid and in full effect until sixty (60) days after I have returned to United States military control following termination of such "missing", "missing-in-action" or "prisoner-of-war status".

This language has been extracted from the recommended form of a general power in Chapter 32 of the Legal Assistance Handbook, DA Pamphle 27-12. Modification of this wording by the individual Legal Assistance Officer is encouraged and recommended to conform each power to the specific needs of his client.

**5. Support and Dependency:**

If military dependents receive an allotment insufficient for adequate support from the pay of a serviceman absent on military duty, a recent Federal District Court case in Northern California, *Remillard v. Carleson*, 325 F. Supp. 1272 (N.D. Calif. 1971), indicates they may possibly qualify for state aid for dependent children if they reside in a state participating in the Federal Aid to Families with Dependent Children Program (42 U.S.C. §§ 601 et seq.). Part of this program gives aid to needy children who are "deprived of parental support or care by reason of the — continued absence from the home — of a parent". In the Remillard case, plaintiff mothers, who seldom received allotments of more than $150.00 per month, brought suit in the U. S. District Court when California refused aid. California was of the opinion that even though the children were in need, an absence occasioned by a father's military duties could never be "continued" within the meaning of 42 U.S.C. § 601. Although the court acknowledged that the precise definition of "continued absence" rested with the States, it cited regulations of the Department of Health, Education and Welfare, which indicated that service in the armed forces must necessarily be considered in determining whether or not there is continued absence. As California by its conclusive presumption, sought to exclude entirely any consideration of absence because of military service in determining whether there was "continued absence", the court found the conclusive presumption an unreasonable basis for legislative classification and contrary to Congressional intent. While not all military absence would qualify as "continued absence", involuntary military absence would so qualify, particularly if it caused distress to dependents by depriving the serviceman of supplementary civilian employment (e.g., the serviceman who loses a civilian job upon induction or overseas transfer) and requiring reliance upon the possible uncertainties of the military allotment system.

**6. Taxation:**

a. *Federal Gift and Estate*

All LAOs are reminded of the new due dates on Federal Estate Tax Returns required by the Estate, Gift, and Excise Tax Adjustment Act of 1970. For estates in which the decedent's death occurred on or after January 1, 1971, the Federal Estate Tax Return is due nine months from the date of death, and the alternate valuation date is six months. However, decedents' estates with a date of death prior to January 1, 1971, will continue to be subject to the old rule of fifteen months for filing and one year on the alternate valuation date. The act also requires Federal Gift Tax Returns to be filed by the fifteenth day of the second month following the calendar quarter in which the gift is made, rather than annually under the former rule.

b. *Pennsylvania Income Tax:*

The Pennsylvania Supreme Court has declared that state's income tax law unconstitu-

tional. The Legal Assistance Office, OTJAG, has not had an opportunity to review the court's opinion and is not in a position to comment upon it. There is no definitive information available on how the legislature will react to this decision or how claims for refund of estimated taxes paid will be handled. However, newspaper reports have indicated that Pennsylvania has expended or committed the funds collected to date. It is probable the legislature will enact a statute reconcilable with the strictures of the constitution. Consideration should be given to advising clients who have paid estimated taxes to submit a claim for refund.

c. The Rhode Island Income Tax expired on 30 June 1971 and was not re-enacted. However, this does *not* effect the obligation of Rhode Island taxpayers for the period 1 January 1971 to 30 June 1971. The return for this period is due on 15 April 1972, and estimated tax payments were due on 15 April and 15 June 1971.

7. **Veterans' Benefits: Cadets & Midshipmen**

Cadets and midshipmen at the service academies generally are eligible for benefits administered by the Veteran's Administration provided they meet the requirements for each individual benefit. However, for purposes of Veterans Educational Assistance Benefits, "active duty" does not include any period during which an individual served as a cadet or midshipman at one of the service academies, (38 USC 1652, 1661). Thus, service as a cadet or midshipman does not render one eligible for education benefits under the GI Bill. For example, a cadet with no previous active duty in the armed forces, after completing eight months of training at West Point, is permanently disabled while engaging in some required activity at the academy and thereby forced to leave. He is entitled to medical and hospital benefits and compensation under the Veterans Administration, but not to any assistance for completion of his education at a state or private institution.

## ETS OF U. S. ARMY PERSONNEL AWAITING TRIAL BEFORE FOREIGN CRIMINAL TRIBUNAL

*(The following item was prepared by the International Affairs Division, OTJAG.)*

In three recent cases involving three separate commands, units have permitted the ETS of Army personnel awaiting criminal trials before foreign courts to pass without complying with the provisions of paragraph 2-11 of AR 635-200. This regulation provides that, prior to the date of the accused's release from the service, because of his ETS, foreign officials will be requested to permit departure of the accused from their jurisdiction or to accept his custody. In the event the foreign officials decline these alternatives, efforts will be made to obtain an affidavit expressing the voluntary written consent of the accused for his retention in the service beyond his ETS until final action on the charges have been completed. In the event the accused does not wish to extend his term of service, the case will be referred to the Adjutant General, ATTN: AGPO-SS, Department of the Army, Washington, D.C. 20314, for instructions. The foregoing is a brief summary of the pertinent provisions and should not be used in lieu of reading the actual provisions.

The failure to comply with paragraph 2-11 of AR 635-200 has a significant impact upon the International Affairs and Litigation responsibilities of the Office of the Judge Advocate General. Although this is properly an AG function, Staff Judge Advocates having foreign criminal liaison responsibilities should closely monitor such cases and insure, through their AG, that the units of such individuals are aware of their responsibilities under the provisions of this regulation.

## A MINOR RECURRING THEME: PROBLEMS OF COURT-MARTIAL JURISDICTION OVER INACTIVE RESERVISTS.

*(This article was written by Mr. Robert Gerwig, Attorney-Adviser and Special Assistant*

*to the Staff Judge Advocate, HQ, Third US Army, Fort McPherson, GA.*)

Once again a haircut case generates legal problems. In considering a habeas corpus action by an enlisted man in the U. S. Marine Corps Reserve seeking relief from the sentence of a summary court-martial (CHL 21 days, F $60 per month for 1 mo., red, to gr. of PVT E-1, execution deferred pursuant to Art. 57, UCMJ), a Federal District Court found that the court-martial lacked jurisdiction to try the accused. *Wallace* v. *Chafee*, 323 F. Supp. 902 (S.D. Calif. 1971).

The result of the case was not particularly surprising, in view of previous uncertainty over the intent of the UCMJ to provide court-martial jurisdiction over reservists on inactive duty training. This condition may be imparted, at least in some degree, to lack of effective guidance for commanders in the field, including those in the reserve components. The path followed by the court in reaching its conclusion in *Wallace* may further becloud that doubt.

The essential facts, as articulated by the court, follow: Petitioner enlisted in the Marine Corps Reserve on 9 Jan 1967. Prior to taking the oath of enlistment, he was presented with written orders assigning him to Class II, inactive duty for training with the Fourth Tank Battalion, Force Troops, Fleet Marine Force. The orders recited that upon his voluntary acceptance he would be required to perform 48 regular drills and not more than 17 days of ADT each year, and that during those periods of "training duty" he would be subject to the UCMJ. He executed a written endorsement to the orders stating his voluntary acceptance. In early 1970 he was charged with willfully disobeying an order of his superior commissioned officer to get a haircut. He rejected Art. 15 punishment in favor of trial by court-martial and was subsequently convicted and sentenced as indicated.

Jurisdiction was predicated on Art. 2(3), which makes subject to the UCMJ

> "Members of a reserve component while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and which specify that they are subject to this chapter."

The petitioner's challenge was threefold:

a. Orders subjecting him to the Code were invalid because issued prior to oath of enlistment when he was, in fact, a civilian. This was not a legally formidable approach and the court rejected the argument on the theory that "the volitional act of accepting these orders survives until the administration of the oath accomplishes the complete change of status."

b. Such jurisdiction is limited to situations involving "the use of dangerous and expensive equipment." This argument derives from pertinent commentary at preliminary Congressional hearings considering the provision. The court rejected the argument (since the condition was not specified in the ultimate legislative product) with the traditional gloss which attends such disposition: "Where statutory provisions are clear and unambiguous on their face, there is no warrant for consulting the legislative history." The facts do not establish the specific context in which the offense was committed, though the court notes that petitioner was a tank crewman and that "if there were a jurisdictional requirement of dangerous and expensive equipment, a tank would surely fall within that category." Curiously (in view of its previous identification of the statutory provisions as "clear and unambiguous"), the court subsequently referred to similar legislative history in support of its ultimate view. And, also somewhat curiously, the court acknowledged "a Congressional desire that the application of military justice not be automatic," at least in part because of the legislative commentary concerning "dangerous and expensive" equipment. The result seems to reflect an unusual bifurcation that legislative history may be used to indicate an inchoate Congressional "desire" but not such an intent that may be incorporated in the ap-

plication of the statutory provision in the light of that desire.

c. The single blanket order, which purports to extend court-martial jurisdiction over all inactive (and, unnecessarily, even *active*) duty training periods during the enlistment, eliminates any choice beyond the day of enlistment and is incompatible with the requirement that the orders be voluntarily accepted. By its own reliance this time on legislative history of the basic statute, the court stated:

> "This material suggests not only that the individual reservist is to retain a choice as to his status vis a vis military justice, but also that a corresponding reevaluation would be carried out by the military. The discussion of dangerous and expensive equipment, while it did not result in a jurisdictional limitation, indicated a Congressional desire that the application of military justice not be automatic. In any event, insofar as an individual is concerned, the military may not, by inducing a 'waiver' of objection to court-martial jurisdiction at the time of enlistment, impose that jurisdiction for the balance of the enlistment of an inactive duty reservists."

In answer to a government argument that if orders were required to be issued prior to each drill, this would entail much paperwork and (worse) uncertainty over who would participate, the court conceded that such order could extend to an entire period of enlistment, provided the reservist be given opportunity to revoke his consent prior to any scheduled drill. Under the circumstances presented, the court found that the particular orders were not "voluntarily accepted" and therefore jurisdiction did not obtain.

Though not controlling in the result, the court's summary rejection of the "dangerous and expensive equipment" theory tends to obliterate a premise based in part on JAGA 1967/4322, 20 Sep 1967, 68-8 JALS 17, which tended to discourage reserve commanders from freely asserting court-martial jurisdiction on the mere proof of "voluntary" orders issued under the apparent mandate of the statutory provision. For purposes of this discussion, it is assumed that the Court would extend its rejection of the legislative history argument also to that portion thereof reflecting comments by a DOD representative to the effect that the provision in question was not intended to apply to routine meetings, etc. *Wallace* @ 906. In addition, it should be noted that the District Judge construed "dangerous or expensive equipment" to include tanks, thus suggesting that the original concept of ships and planes may give way to a variety of other and more common (albeit expensive) equipment.

Personal experience has suggested the informal expedient of advising close coordination by Reserve (and Active Army superior) commanders with staff judge advocates prior to instituting disciplinary measures based on the UCMJ. Precedents relied on have included the 1967 opinion previously cited and other related materials referred to in Comment, 44 Mil. L. Rev. 123 (1969), notably the mentioned legislative history. These have provided a convenient basis for advice to divert contemplated non-judicial punishment (or indeed more severe action pursuant to the UCMJ) to appropriate administrative actions. *Prior* coordination with staff judge advocates has been emphasized as a means to resolve unnecessary problems relating to jurisdiction under the Code.

The implications of *Wallace* strongly suggest the need at least for interim uniform administrative guidance. Beyond that, it may be appropriate as well to consider action leading toward remedial legislation, to avoid random efforts at relatively low levels of command to precipitate the "extraordinary exercise of military judicial authority" about which Judge Ferguson warned in his guarded concurrence in *U. S.* v. *Schuering*, 16 USCMA 324 (1966), 36 CMR 480. Such legislation might be gauged to eliminate the provision altogether as unnecessary in the administration of inactive reserve personnel, or to include suitable limitations.

Though the problem quantitatively is not of major proportions, yet adequate guidance should be available when circumstances

prompt a reserve commander to consider the possibility, e.g., of administering non-judicial punishment, thus generating potential complexities (in a Reserve context) if the trial option is chosen by the respondent.

Continued failure to promulgate appropriate uniform guidance in either administrative or legislative form is likely to compound the present confusion and generate potential litigation as in the *Wallace* case.

## PERSONNEL ACTIONS

*(Personnel Actions are provided by the Personnel, Plans and Training Office, OTJAG.)*

1. *RETIREMENTS.* On behalf of the Corps, we offer our best wishes for the future to the following officers and warrant officers retired or retiring after many years of faithful service to our country. Major General Kenneth J. Hodson retired on 30 June 1971. He was recalled to active duty on 1 July 1971 as Chief Judge, Court of Military Review.

*RETIRED 3 June 1971*

CW4 CRAWFORD, Earl S.

*RETIRED 30 June 1971*

COL COLLINS, Rodney J.
LTC BARTELLE, Talmadge L.
CW2 BURKE, Larry A.

*RETIRING 31 July 1971*

COL WITCOVER, Henry W.
LTC ROUSE, Joseph H.

2. *PROMOTIONS.* Congratulations to the following officers who will be promoted on the dates indicated.

| | | |
|---|---|---|
| COL BELTMAN, Laurence J. | 14 July | 1971 |
| COL GOMEZ, Viviano | 4 August | 1971 |
| COL KING, Ward D. | 12 July | 1971 |
| COL MINIS, Carol | 12 July | 1971 |

3. Major General Lawrence J. Fuller was reassigned to Defense Intelligence Agency 1 July 1971.

4. *ORDERS REQUESTED AS INDICATED.*

| *NAME* | *FROM* | *TO* | *APPROX. DATE* |
|---|---|---|---|
| | *COLONELS* | | |
| BOYLE, Germain P. | USAG Ft Carson | USA Claims Svc Ft Meade | Sep 71 |
| KELSO, Winchester | USA Jud | 3A Ft McPherson | Jul 71 |
| PINTO, Ralph D. | TJAGSA | Elec CMD Ft Monmouth | Jun 71 |
| VAN CLEVE, Joseph | USAAVSCOM St Louis | Com Dev Cmd Ft Belvoir | Sep 71 |
| | *LIEUTENANT COLONELS* | | |
| COOK, Peter H. | OTJAG | Hq 6A Pres SF | Jul 71 |
| DONAHUE, Joseph E. | Korea | USA Jud | Sep 71 |
| GODDARD, Ross M., Jr. | DOMS, DA | ASBCA Wash DC | Aug 71 |
| HARVEY, Alton H. | Thailand | USARV | Aug 71 |
| LAKES, Cecil T. | OTJAG | AMC Wash DC | Jul 71 |
| | *MAJORS* | | |
| BATEMAN, Robert E. | USA Dep Tooele | Europe | Aug 71 |
| BUCK, Richard S., IV | OTJAG | USA Strike Comd Macdl AFB | Aug 71 |
| MURRAY, Charles A. | Stu Det 1A | USAG Ft Meade | Aug 71 |
| SHEA, Quinlan J., Jr. | Korea | OTJAG | Oct 71 |
| | *CAPTAINS* | | |
| ARKOW, Richard S. | OTJAG | USA Jud w/dy Europe | Aug 71 |
| ASHBY, Richard J. | XVIII ABN Corps Ft Bragg | USARV | Oct 71 |
| BACINO, Bazile | Vietnam | USATCI Ft Dix | Jul 71 |
| BARBER, Oliver H. | Vietnam | Hq 6A Pres SF | Nov 71 |

| *NAME* | *FROM* | *TO* | *APPROX. DATE* |
|---|---|---|---|
| | *CAPTAINS* (Cont.) | | |
| BONARD, Glenn R. | Korea | USA Jud | Aug 71 |
| BURNS, Joseph H. | Vietnam | HQ USATCI Ft Ord | Dec 71 |
| COUPE, Dennis F. | Stu Det 6A | HQ USARHAW | Jan 72 |
| CRUDEN, John C. | Vietnam | Stu Det 6A | Aug 71 |
| DALY, Dennis D., Jr. | HQ USATCI Ft Ord | USARV | Nov 71 |
| DUESNER, Edwin E. | USAG Ft Hood | USA Jud w/dy Ft Hood | Jul 71 |
| DOYLE, Brooks S., Jr. | USAIC Ft Benning | USARV | Oct 71 |
| DRAKE, Gurden E. | Vietnam | USA Med R-D Cmd Wash | Nov 71 |
| EAK, Gerald J. | Stu Det 1A | USA LOG MGMTCEN Ft Lee | Jan 72 |
| EASTON, William G. | 4th BN 63d Armor Ft Riley | Stu Det 5A | Jul 71 |
| EDWARDS, John T. | Ft Benning | USA Jud w/dy Ft Benning | Jul 71 |
| FITZMORRIS, John D. | OTJAG | USATCI Ft Polk | Sep 71 |
| FOLAWN, John S. | EN C Ft Belvoir | USATCI Ft Lewis | Aug 71 |
| FONTENOT, Russell | 82d Abn Div | USARV | Oct 71 |
| GARRETT, Stacy E. | Vietnam | Hq USATCI Ft Ord | Nov 71 |
| GILLUM, Robert E. | Vietnam | USAA Sch Ft Knox | Sep 71 |
| HAITHCOCK, Worth T. | Vietnam | USATCI Ft Dix | Nov 71 |
| HART, John M., Jr. | Stu Det 1A | USAG Ft Meade | Jan 72 |
| HUCH, Peter M. | USATCI Ft Ord | 1 Cav Div Ft Hood | Aug 71 |
| HURWITZ, Stephen I. | Korea | USA Jud | Sep 71 |
| JEFFREY, Michael L. | Korea | USAG Ft Hamilton | Dec 71 |
| JONES, John H., Jr. | Vietnam | USAECFB Ft Belvoir | Nov 71 |
| JURBALA, Stephen B. | Vietnam | HQ 5a Ft Sam Houston | Nov 71 |
| KEARNS, Micheal B. | USA Arm Cen Ft Knox | HQ USARAL | Nov 71 |
| KEMPER, James D. | HQ 1st Regn AD Stwrt AFB USARV | USARV | Nov 71 |
| LESLIE, Robert L. | USA Med DAC Ft Monmouth | Stu Det 1A | Aug 71 |
| LEVY, William B. | Vietnam | HQ 6A Pres SF | Nov 71 |
| LEWIS, Paul W. | HQ MDW | Europe | Jan 72 |
| LINCOLN, Arthur F. | Stu Det 1A | Stu Det TJAGSA | Sep 71 |
| LOVELAND, Daniel J. | Vietnam | USAG Pres SF | Nov 71 |
| MACKEY, Richard | Vietnam | Europe | Dec 71 |
| MARON, Andrew W. | Europe | Stu Det 6A | Aug 71 |
| MARSHALL, Thomas J. | Vietnam | USATCI Ft Lewis | Nov 71 |
| McCULLOUGH, Thomas | Vietnam | USA Jud | Dec 71 |
| PENNINGTON, Jerry | Alaska | USA Arm Cen Ft Knox | Nov 71 |
| PETERSON, Stephen | MTMTS Oakland CA | Hq 6A Pres SF | Sep 71 |
| PRATT, Donald | USAIC Ft Benning | OTJAG | Aug 71 |
| SCHEMPF, Bryan H. | Europe | Stu Det 5A | Aug 71 |
| SUTTON, Christopher | Vietnam | USATCI Ft Lewis | Dec 71 |
| TRUSCOTT, Wesley | Vietnam | HQ USATCI Ft Ord | Jun 71 |
| VALENTINE, James I. | Stu Det 1A | Europe | Jan 72 |
| VARGO, Gregory O. | Stu Det 1A | USAARMC Ft Knox | Nov 71 |
| WILKERSON, James N. | USAARMC Ft Knox | S-F USMA | Sep 71 |
| | *LIEUTENANTS* | | |
| GREGG, Robert E. | Hawaii | Stu Det 3A | Aug 71 |
| JUDD, Kim K. | Fld Arty Ctr Ft Sill | Stu Det 5A | Aug 71 |
| SWICK, Richard L. | Alaska | Stu Det 1A | Aug 71 |
| | *WARRANT OFFICERS* | | |
| RAMSEY, Alzie E., Jr. | USATC Ft Leonard Wood | S-F TJAGSA | Oct 71 |

5. *FOLLOWING ORDERS REVOKED.*

| *NAME* | *FROM* | *TO* | *APPROX. DATE* |
|---|---|---|---|
| GARDNER, James G. LTC | USATCI Ft Polk | OTJAG | Sep 71 |
| NELSON, Shelton R. LTC | USA Elec Fld Cm Sandia | USATCI Ft Polk | Jul 71 |
| WOLD, Pedar C. MAJ | JFK Mil Asst Ft Bragg | USA Stk Comd MACDL AFB | Jul 71 |

6. *NEWLY COMMISSIONED JAGC OFFICERS.* The following CAPTAINS recently commissioned in JAGC are assigned as indicated.

| | |
|---|---|
| CARTE, Gene Jr. | HQ USAIC Ft Benning |
| HATCHER, John E. | USAG Ft Monroe |
| KELLEHER, Dennis J. | Hq 82d ABN Div Ft Bragg |

## BOOKS OF INTEREST TO LAWYERS

The Adjutant General recently purchased for worldwide distribution twenty selected books of professional interest to Army lawyers. The titles were chosen from the fifty-eight volume Recommended Reading List for Judge Advocates, compiled last year by the Office of The Judge Advocate General. Many of the remaining volumes are already in stock at installation libraries. OTJAG urges judge advocates to consult with local Army librarians to determine the availability of books of general professional interest. Suggestions for additions to the Recommended Reading List should be sent to The Judge Advocate General; ATTN: PP&TO, Department of the Army, Washington, D.C. 20310. This list of professional books should not be confused with the Selections and Holdings List of the Army Field Law Library Service which is a catalog of legal research materials for use in judge advocate offices.

## BOOKS OF PROFESSIONAL INTEREST

| | |
|---|---|
| Corwin, Edward S. | *The President, Office and Powers,* NYU Press (Fourth Edition, 1957) |
| Lewis, Anthony | *Gideon's Trumpet,* New York, Random House, 1964 |
| Morrill, Alan E. | *Anatomy of a Trial,* Chicago CCR 1968 |
| Nierenberg, Gerald I. | *The Art of Negotiating.* Hawthorn 1968. New York |
| Ikle, Fred C. | *How Nations Negotiate.* Harper. 1964 |
| David, Rene and Brierley, E. C. | *Major Legal Systems in the World Today.* Free Press 1969 |
| Bowen, Catherine D. | *The Lion and the Throne the Life and Times of Sir Edward Coke.* Boston: Little, Brown, 1957 |
| Bowen, Catherine D. | *Yankee from Olympus; Justice Holmes and his family.* Boston: Little, Brown, 1944 |
| King, Willard L. | *Melville W. Fuller, Chief Justice of the U. S.* New York: Macmillan, 1950 Avail in paper back, U. of Chicago * P528 |
| Mason, Alpheus T. | *Brandeis; a free man's life.* New York: Viking Press, 1946 |
| Reynolds, Quentin J. | *Courtroom, the Story of Samuel S. Leibowitz.* New York: Farrar, Straus, 1950 Popular Library |
| Stone, Irving | *Clarence Darrow for the Defense,* Garden City, New York: Doubleday, 1941 |
| Crafee, Zechariah, Jr. | *Free Speech in the U. S.* Cambridge, Mass.: Harvard University Press, 1941 |
| Fromm, Erich | *Escape from Freedom.* New York: Holt 1941 |
| Newman, Edwin S. | *The Freedom Reader.* New York: Oceana, 1963 |
| Codwin, Edward S. | *The Constitution and What It Means Today,* 12th ed Princeton, New Jersey: Princeton Press, 1958 |
| Cahn, Edmond | *The Moral Decision; right and wrong in the light of American law.* Peter Smith 1956 |

Frank, Jerome *Law and the Modern Mind.* Peter Smith 1949

Holmes, Oliver Wendell *The Common Law.* Boston. Little, Brown, 1881

Pound, Roscoe *An Introduction of the Philosophy of Law.* New Haven: Yale University Press, 1954

## MILITARY AFFAIRS OPINIONS*

(Retired Members — Civilian Pursuits) **Retired Regular Army Officer May Not Accept Money From Foreign Government.** A Regular Army officer about to retire was a doctoral candidate at business school. His thesis was of interest to foreign governments and he solicited and received a promise of financial support from the Federal Republic of Germany in return for copies of the completed thesis. He was also to receive support from DOD in the form of date and interview cooperation. The Judge Advocate General stated that although the matter was not entirely free from doubt, it appeared that the activities would not violate the conflict of interest statutes (37 U.S.C. § 801(c); 18 U.S.C. §§ 207, 281, 283). However, his accepting money from the German Government would violate Art. I, sec. 9, of the U. S. Constitution. (See JAGA 1970/4340, 17 Jul. 1970). JAGA 1971/3420, 17 Fed. 1971.

(Dependents — Privileges) **Children Of Remarried and Divorced Army Widow Not Eligible For Certain Post Privileges.** The widow of an Army officer with three children married a warrant officer. This second marriage ended in divorce. The Judge Advocate General opined that UP AR 31-200, 13 Feb. 1968, as changed, and AR 60-20, 17 Oct. 1968, as changed, the children were not entitled to commissary or exchange privileges. JAGA 1971/4048, 11 May 1971.

* The headnotes for these opinions conform to The Judge Advocate General's School School Text, "Effective Research Aids For The Preparation of Military Affairs Opinions," February 1971. The digests of these opinions may be clipped and saved on 3" x 5" cards.

(Retired Members — General) **Loss of U. S. Citizenship Terminates Retirement Benefits.** A retired Regular Army enlisted member stated that he was considering becoming a citizen of Canada and asked what effect such action would have on his retirement benefits. The Judge Advocate General stated that voluntary renunciation of U. S. citizenship would terminate his rights to retired pay and his dependent's rights to other retirement privileges. However, such renunciation requires an expatriative act, beyond mere permanent residence in a foreign country. (See JAGA 1971/3798, 23 Mar. 1971; JAGA 1970/4352, 6 Aug. 1970; JAGA 1969/4361; 23 Sep. 1969; JAGA 1962/4866, 29 Nov. 1962; 41 Comp. Gen. 715 (1962); 48 Comp. Gen. 699 (1969).) JAGA 1971/4073, 27 Apr. 1971.

(Prohibited Activities — Gifts) **Bowling Score Sheets May Be Accepted As A Gift If Proper Conditions Met.** A company proposed giving bowling score sheets to military bowling lanes located on a military reservation. It was asked whether such gifts could be accepted UP subpara. 3*d*, AR 405-80, 9 Aug. 1965; para. 4, AR 1-101, 31 Oct. 1966; subpara. 8*b*(5), AR 600-50, 29 Jun. 1966; and DA Message 212202Z, 21 Apr. 1971.

It was opined that the Commanding General could, in his discretion, and subject to the restrictions contained in para. 4, AR 1-101, *supra*, acept the bowling score sheets as gifts, under the following conditions:

a. The donor is not a vendor or supplier of the bowling alley.

b. The donor is not an agent or contractor for a vendor or supplier of the bowling alley.

c. The score sheets contain no advertisements by vendors or suppliers (or their agents) of the bowling alley.

d. The score sheets contain a disclaimer of Army indorsement of any advertisements contained thereon.

JAGA 1971/4134, 20 May 1971.

(Prohibited Activities — General) **Carrying Concealed Weapons.** In response to a request for information from the American Civil Liberties Union, The Judge Advocate General stated that while Army Regulations do not prohibit military personnel from carrying weapons off-duty, Article 134, UCMJ, prohibits the unauthorized carrying of concealed weapons, with the limitations contained in *O'Callahan v. Parker*, 395 U. S. 258 (1969). Also, military personnel off post and off duty are subject to local civil restrictions concerning carry weapons. JAGA 1971/4149, 10 May 1971